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March 1, 2004

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 - 12<sup>th</sup> Street, SW, Room TW-A325  
Washington, DC 20554

Re: Improving Public Safety Communications  
in the 800 MHz Band, WT Docket No. 02-55

Dear Ms. Dortch:

On February 26, 2004, Verizon Wireless filed an ex parte letter with the FCC in the above-captioned proceeding that included a legal memorandum prepared by Wiley, Rein & Fielding. That document had two minor typographical errors in the text. The attached corrected version is being filed to correct those errors. Pursuant to Section 1.1206(b)(2) of the Commission's Rules, an electronic copy of this letter is being filed for inclusion in the above-referenced docket.

Very truly yours,

/s/  
Donald C. Brittingham

Attachment

cc:   Bryan Tramont  
      Sheryl Wilkerson  
      Jennifer Manner  
      Barry Ohlson  
      Sam Feder  
      John Muleta  
      Edmond Thomas  
      Jane Mago  
      Cathy Seidel  
      David Furth  
      D'wana Terry

      Walt Strack  
      Aaron Goldberger  
      Michael Wilhelm  
      Sara Mechanic  
      Julius Knapp  
      Jim Schlichting  
      Bruce Franca  
      Alan Scrim  
      Lauren Van Wazer  
      Evan Kwerel  
      Ken Carter

**THE FEDERAL COMMUNICATIONS COMMISSION  
LAWFULLY MAY ORDER NEXTEL TO PAY THE COSTS OF  
RELOCATING INCUMBENT 800 MHz LICENSEES**

**February 27, 2004**

**Prepared by**

**Wiley Rein & Fielding LLP**

**for Verizon Wireless**

## **I. EXECUTIVE SUMMARY**

Now pending before the Federal Communications Commission (“Commission” or “FCC”) are a number of proposals to remedy the interference to public-safety operations in the 800 MHz band caused by Nextel’s use of neighboring spectrum. This memorandum argues that the FCC has ample legal authority under the Communications Act to require that Nextel pay the costs of relocating incumbent 800 MHz licensees, as part of a comprehensive new spectrum band plan that ameliorates future interference and affords Nextel an improved home for its operations.

In particular, the FCC may require Nextel to bear the costs of relocating incumbent public-safety licensees, since Nextel would displace them from their spectrum and occupy it for its own use. The Commission has ordered similar measures a number of times in the past, and this policy has been sustained by the D.C. Circuit. The FCC’s authority to order Nextel to pay these relocation costs is enhanced by the agency’s special statutory duties to protect the needs of public-safety licensees. Finally, the Commission lawfully may require that Nextel assume the relocation costs of business and industrial users, since they would be moved as a direct result of Nextel’s relocation of the public-safety licensees.

## **II. BACKGROUND**

For several years, the Commission has been considering ways to alleviate harmful interference caused to critical public-safety communications in the 800 MHz band.<sup>1</sup> Public-safety licensees include police and fire agencies, medical rescue teams, and other first-responders charged with protecting citizens’ lives and property.<sup>2</sup> It goes without saying that these sorts of

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<sup>1</sup> See *Improving Public Safety Communications in the 800 MHz Band*, 17 FCC Rcd 7169 (2002).

<sup>2</sup> See *id.* ¶ 11.

operations demand “a high degree of system reliability.”<sup>3</sup> Regrettably, public-safety users are experiencing interference due to the operations of Nextel, a mobile-telephone licensee, in adjacent blocks of spectrum.<sup>4</sup> As a result, public-safety users have experienced difficulties ranging from “loss of coverage” and “signal quality problems on particular frequencies,” to “system access difficulties” and “prolonged response times.”<sup>5</sup>

The Commission has solicited comment from the public on how best to remedy the interference caused by Nextel’s operations. One possible solution would involve the relocation of certain public-safety licensees, which currently operate between 821 and 824 MHz (and in paired channels between 866 and 869 MHz), to a block of channels lower in the 800 MHz band. The spectrum vacated by these licensees would be licensed to Nextel for mobile-telephone services. Also, a number of business and industrial users would be relocated from their current home in a block of interleaved channels between 809.75 and 816 MHz (and in paired channels between 854.75 and 861 MHz), to elsewhere in the 800 MHz band. These users’ spectrum would be taken over by the public-safety licensees displaced by Nextel. In other words, Nextel’s displacement of the public-safety users would set off a chain reaction, as a direct result of which the public-safety users would displace the business and industrial licensees. (See Attachment A.)

Implementing these steps would both ameliorate the interference problems Nextel currently is causing to public-safety users in the 800 MHz band, and free up a valuable, contiguous block of spectrum for Nextel’s use. Indeed, this realignment would confer on Nextel an enormous windfall – which Kane Reece estimates to be worth nearly \$2.3 billion – by

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<sup>3</sup> *Id.*

<sup>4</sup> *See id.* ¶ 10.

<sup>5</sup> *Id.* ¶ 14.

replacing its current pockmarked allocation with a large block of contiguous, nationwide spectrum in the 800 MHz band.

This rebanding scenario would include a requirement that Nextel pay the relocation costs of the public-safety licensees who find themselves evicted and reassigned to different spectrum in the 800 MHz band. Nextel also would pay to reassign the business and industrial users who must move to make room for the public-safety licensees displaced by Nextel. Relocation costs can include FCC filing fees, the costs of retrofitting existing equipment to operate at the new frequencies, and the costs of constructing entirely new facilities.

In the so-called “Consensus Plan,” Nextel characterizes its obligation to fund necessary relocation costs as voluntary and contingent. The contingency, according to Nextel, is the Commission’s approval of unrelated spectrum transactions that would give Nextel 10 MHz of spectrum at 1.9 GHz, in addition to a block of contiguous spectrum in the 800 MHz band. As detailed below, the Commission does not need Nextel’s consent or concurrence to take the steps necessary to protect public-safety licensees, nor does it need to reach out of the 800 MHz band to resolve interference with public-safety operations.

### **III.** **ARGUMENT**

The D.C. Circuit has squarely held that the Commission has the legal authority to require entities that displace incumbent licensees, and that use the vacated spectrum for their own purposes, to bear the displaced users’ relocation costs. For instance, in *Teledesic LLC v. FCC*,<sup>6</sup> the Commission required satellite providers who displaced fixed terrestrial licensees in the 18 GHz band, to pay the latter’s costs of relocation. The court upheld the obligation, explaining that

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<sup>6</sup> 275 F.3d 75 (D.C. Cir. 2001).

when providers “displac[e] existing users” in a given band of spectrum, they can be “forced to pay those existing users to relocate to comparable facilities.”<sup>7</sup>

The policy approved in *Teledesic* is hardly an innovation. Rather, the Commission routinely has required that incumbent licensees’ relocation costs must be borne by users who displace them and occupy their spectrum. In addition to the order at issue in *Teledesic*,<sup>8</sup> the Commission in 1992 required PCS users to pay to relocate displaced fixed microwave users.<sup>9</sup> In 1995, the Commission ordered certain SMR licensees to bear the costs of relocating displaced incumbent SMR licensees.<sup>10</sup> And two years later in that same proceeding, the Commission reaffirmed the obligation to pay relocation costs.<sup>11</sup> The D.C. Circuit just as regularly has given effect to orders containing these types of requirements.<sup>12</sup>

Precisely the same situation is presented in the 800 MHz matter. The Commission now is considering proposals that would move public-safety licensees from the spectrum between 821 and 824 MHz (and between 866 and 869 MHz), and that would award that spectrum to Nextel. Because Nextel, like the satellite providers in *Teledesic*, would step into the spectrum vacated by the incumbent public-safety users, the Commission lawfully can require it “to pay those existing licensees to relocate to comparable facilities.”<sup>13</sup>

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<sup>7</sup> *Id.* at 86.

<sup>8</sup> See *Redesignation of the 17.7-19.7 GHz Frequency Band, Report and Order*, 15 FCC Rcd 13,430 (2000).

<sup>9</sup> See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rulemaking*, 7 FCC Rcd 6886 (1992).

<sup>10</sup> See *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, First Report and Order*, 11 FCC Rcd 1463 (1995).

<sup>11</sup> See *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Second Report and Order*, 12 FCC Rcd 19,079 (1997).

<sup>12</sup> See, e.g., *Small Bus. in Telecomm. v. FCC*, 251 F.3d 1015, 1017, 1026 (D.C. Cir. 2001); *Ass’n of Pub.-Safety Communications Officials – Int’l, Inc. v. FCC*, 76 F.3d 395, 400 (D.C. Cir. 1996).

<sup>13</sup> *Teledesic*, 275 F.3d at 86. The enormous financial windfall Nextel stands to receive from rebanding within the 800 MHz band – estimated to be worth nearly \$2.3 billion – confirms the propriety of requiring it to shoulder

The Commission’s authority to require Nextel to shoulder relocation costs is enhanced by its “special statutory obligation with respect to [public-safety licensees].”<sup>14</sup> Section 151 of the Communication Act mandates that the FCC allocate spectrum in a way that promotes the “safety of life and property”<sup>15</sup> – a directive that has been construed to “require the FCC to give the[] needs [of public-safety users] priority over those of commercial broadcasters.”<sup>16</sup> The special status of public-safety licensees is reinforced by other provisions in the Communications Act. For instance, Section 337 requires the Commission to allow public-safety users access to any unassigned channels.<sup>17</sup> No comparable entitlement exists for other types of licensees.

The Communications Act’s legislative history likewise unambiguously reveals Congress’s intent to extend special treatment to public-safety operations. According to a 1981 Senate Committee Report, “radio services which are necessary for the safety of life and property deserve more consideration in allocating spectrum than those services which are more in the nature of convenience or luxury.”<sup>18</sup> The House of Representatives sounded a similar theme several years later: “The Committee believes, as it has stated on prior occasions, that public safety consideration should be a top priority when frequency allocation decisions are made.”<sup>19</sup> The Commission therefore has a heightened responsibility to ensure that any rebanding plan makes whole the public-safety users that would be displaced by Nextel.

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relocation costs. Nextel can certainly not be heard to complain if, in exchange for nationwide contiguous spectrum worth \$3.2 billion, it is made to pay relocation costs in the amount of \$850 million.

<sup>14</sup> *Nat’l Ass’n of Broadcasters v. FCC*, 740 F.2d 1190, 1213 (D.C. Cir. 1984).

<sup>15</sup> 47 U.S.C. § 151 (2000).

<sup>16</sup> *Nat’l Ass’n of Broadcasters*, 740 F.2d at 1213.

<sup>17</sup> *See* 47 U.S.C. § 337(c) (2000).

<sup>18</sup> S. REP. NO. 97-194, at 14 (1981), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2250.

<sup>19</sup> H.R. REP. NO. 98-356, at 27 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2219, 2237.



For similar reasons, the Commission has the authority to order that Nextel pay the costs of relocating the business and industrial users from their current home in the interleaved spectrum to elsewhere in the 800 MHz band. These licensees would be displaced by public-safety users, because the public-safety users would be displaced by Nextel. In other words, Nextel would be ultimately responsible for the eviction of the business and industrial licensees, albeit one step removed. The FCC therefore may order Nextel to bear the costs of the private users' relocation. Even though Nextel itself may not come to occupy their spectrum, their relocation is a direct and necessary consequence of clearing spectrum for Nextel's use and is designed to ameliorate future interference from Nextel's operations.

#### **IV. CONCLUSION**

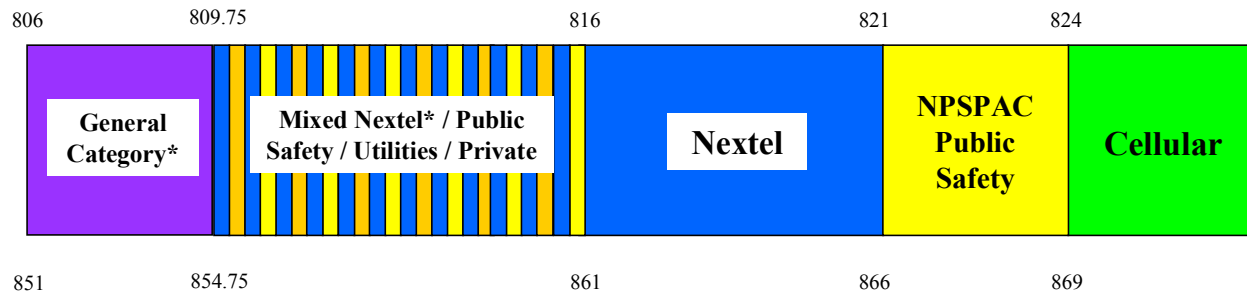
Should the Commission decide to relocate public-safety users from their current home in the 800 MHz band, and to license Nextel to use that spectrum in their place, it would be well within its rights to order that Nextel bear the former's relocation costs. Whenever licensees "displac[e] existing users," they cannot complain if they are asked to "pay those existing users to relocate to comparable facilities."<sup>20</sup> Moreover, the Commission bears a special statutory duty to protect the interests of public safety licensees, as the courts have recognized. Nextel also can be made to pay the causally related "second step" relocation costs of the business and industrial users who would be moved as a direct result of Nextel's relocation the public-safety licensees.

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<sup>20</sup> *Teledesic*, 275 F.3d at 86.

## Attachment A

### The 800 MHz Band Before Realignment



\* Nextel has an average of approximately 4.5 MHz in the General Category and approximately 4 MHz in the interleaved Lower 800 MHz band, but does not have all the channels or all the geography licensed throughout the U.S.

### The 800 MHz Band After Realignment

